Supreme Court, U.S.
F I L E D
SEP 21 1994
OFFICE OF THE CLERK

No. 94-160

In the Supreme Court of the United States

OCTOBER TERM, 1994

JOSEPH A. REILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

13 pp

QUESTION PRESENTED

Whether petitioner was prejudiced by any variance between the charges in the indictment and the proof at trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Berger v. *United States*, 295 U.S. 78 (1935)	5, 6, 7, 9
Cola v. *Reardon*, 787 F.2d 681 (1st Cir.), cert. denied, 479 U.S. 930 (1986)	7, 9
Dunn v. *United States*, 442 U.S. 100 (1979)	7, 8
Kotteakos v. *United States*, 328 U.S. 750 (1946)	5, 6, 9
United States v. *Caporale*, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 482 U.S. 917 & 483 U.S. 1021 (1987)	9-10
United States v. *Eubanks*, 591 F.2d 513 (9th Cir. 1979)	10
United States v. *Glenn*, 828 F.2d 855 (1st Cir. 1987)	9
United States v. *Richerson*, 833 F.2d 1147 (5th Cir. 1987)	9
United States v. *Rosnow*, 977 F.2d 399 (8th Cir. 1992), cert. denied, 113 S. Ct. 1596 (1993)	9
United States v. *Sutherland*, 929 F.2d 765 (1st Cir.), cert. denied, 112 S. Ct. 83 (1991)	9

Statutes:

Judicial Code § 269 (28 U.S.C. 391 (1946))	6
18 U.S.C. 1623	7
21 U.S.C. 841(a)(1)	2
21 U.S.C. 841(b)(1)(A)(vii)	5
21 U.S.C. 846	2
21 U.S.C. 952(a)	2
21 U.S.C. 963	1
28 U.S.C. 2111	6

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-160

JOSEPH A. REILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 19 F.3d 629.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1994. The petition for a writ of certiorari was filed on July 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import marijuana (Count 1), in violation of 21 U.S.C. 963; importing marijuana (Count 2),

in violation of 21 U.S.C. 952(a); conspiring to possess marijuana with the intent to distribute it (Count 3), in violation of 21 U.S.C. 846; and possessing marijuana with the intent to distribute it (Count 4), in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment, to be followed by a two-year term of special parole. The court of appeals affirmed petitioner's convictions but vacated his sentence and remanded for resentencing. Pet. App. 1a-18a.

1. Petitioner was the captain of the *Dan's Plan*, a fishing boat based in Madeira Beach, Florida. In February 1987, he was on board the *Dan's Plan* in the Gulf of Mexico 60 miles west of the Florida coast. The *Dan's Plan* had just completed a fuel transfer with the *Duke*, another fishing boat based in Madeira Beach, when a crew member on the *Dan's Plan* saw a small private airplane pursued by a United States Customs airplane. Crew members on both the *Dan's Plan* and the *Duke* then saw the private airplane dump bales of marijuana into the Gulf. Petitioner had several bales loaded onto the *Dan's Plan*; the other bales were loaded onto the *Duke*. The *Dan's Plan* returned to Madeira Beach; its load of marijuana was sold to a buyer in Michigan. The *Duke* returned to Madeira Beach later the same day; some of its load of marijuana was sold to a local fisherman. Pet. App. 2a-4a.

2. At trial, the district court instructed the jury that it could convict petitioner only if it found that he and his co-defendants—the owner of the *Dan's Plan* and the captain and the owner of the *Duke*—were involved in a single conspiracy, as charged in Counts 1 and 3 of the indictment (Pet. App. 33a):

> You are further instructed, with regard to the alleged conspiracy offense, that proof of several

> separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges.
>
> What you must do is determine whether the single conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit the defendants of that charge. However, if you decide that such a conspiracy did exist, you must then determine who the members were; and, if you should find that a particular defendant was a member of some other conspiracy, but not the one charged in this indictment, then you must find the defendant not guilty.
>
> In other words, to find a defendant guilty, you must unanimously find that he or she was a member of the conspiracy charged in *this* indictment here before you, and not a member of some other separate conspiracy.

The jury found petitioner guilty on all counts.[1]

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-18a. The court first determined that there was a variance between the indictment and the proof at trial; although the indictment charged petitioner with a single conspiracy to import and distribute mari-

---

[1] Daniel Heaton, the owner of the *Dan's Plan*, and Mary Sue Coy, the owner of the *Duke*, were each convicted on Counts 3 and 4 (charging conspiracy to possess, and possession with intent to distribute, marijuana) and acquitted on Counts 1 and 2 (charging conspiracy to import, and importation of, marijuana). Raymond Kothe, the captain of the *Duke*, was tried separately because of medical problems. Pet. App. 2a & n.1, 5a.

juana, the evidence at trial established that the crew of the *Dan's Plan* and the crew of the *Duke* were involved in separate conspiracies. The court explained (*id.* at 8a):

> There is simply an absence of evidence that the two vessels' crews and owners coordinated the importation and subsequent distribution of the marijuana in question. The evidence suggests that two separate conspiracies in fact existed; one involving * * * the *Duke* * * * and another involving * * * the *Dan's Plan*.

The court further held, however, that the variance between the indictment and the proof at trial was not prejudicial. The court observed that a variance is prejudicial when (Pet. App. 10a (internal quotation marks omitted))

> (1) the proof at trial differs so greatly from the charges in the indictment that the defendant is unfairly surprised and has an inadequate opportunity to prepare a defense, or (2) if there are so many defendants and so many separate conspiracies before the jury that there is a substantial likelihood that the jury transferred evidence from one conspiracy to a defendant involved in another conspiracy.

After reviewing the record, the court determined that neither of those conditions obtained. *Ibid.* It noted that petitioner had not claimed unfair surprise, nor could he do so: "Had the indictment charged separate conspiracies, rather than a single conspiracy, it is unlikely the defenses would have varied in any material manner." *Id.* at 11a. The court also determined that there was no basis for concluding that the jury transferred evidence between the two conspiracies: "This case does not present a complicated factual scenario with multiple

defendants and conspiracies that might lead to significant jury confusion in applying the evidence. At most only two conspiracies existed." *Ibid.*[2]

ARGUMENT

1. Petitioner contends (Pet. 9-15) that the court of appeals erred in analyzing this case as one involving a variance between the charges in the indictment and the proof at trial. That contention is foreclosed by this Court's decisions in *Berger* v. *United States*, 295 U.S. 78 (1935), and *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

In *Berger*, the defendant was charged with conspiring with seven other people to utter counterfeit Federal Reserve Bank notes. 295 U.S. at 79-80. The evidence at trial "tended to establish not a single conspiracy as charged but two conspiracies," only one of which involved the defendant. *Id.* at 80. The Court rejected the defendant's argument that the variance was "fatal." *Id.* at 81. The Court said that "[t]he true inquiry * * * is not whether there has been a variance in proof, but

---

[2] At sentencing, the district court determined that the evidence showed a single conspiracy involving both the *Dan's Plan* and the *Duke*, and that the conspiracy involved more than 1000 kilograms of marijuana. See Pet. App. 5a. The district court refused, however, to impose the mandatory minimum penalties required by 21 U.S.C. 841(b)(1)(A)(vii) for conspiracies involving such quantities on the ground that the government had not provided pretrial notice of its intent to seek them. See Pet. App. 5a. The government appealed the sentences. Treating the government's sentencing appeal in this pre-Guidelines case as a petition for a writ of mandamus, *id.* at 12a-13a, the court of appeals concluded that the government was not required to provide pretrial notice of its intention to seek the enhanced penalties. *Id.* at 15a. It accordingly vacated the sentences and remanded for resentencing. *Id.* at 17a. That ruling is not at issue here.

whether there has been such a variance as to 'affect the substantial rights' of the accused." *Id.* at 82 (quoting Section 269 of the Judicial Code, 28 U.S.C. 391 (1946), incorporated in relevant part in 28 U.S.C. 2111). The Court held that, under the circumstances of that case, "the variance was not prejudicial and hence not fatal." 295 U.S. at 84. The Court explained that there was nothing in the record to indicate that the evidence regarding the conspiracy of which the defendant was not a member "operated to prejudice his case, or that it came as a surprise." *Id.* at 83.

In *Kotteakos*, the Court undertook the same inquiry to determine "whether [the defendants] have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones." 328 U.S. at 752. The Court observed that "the errors in variance" in the case before it "were identical in character" to those at issue in *Berger*. *Id.* at 766. The Court also observed that in both cases the trial court had instructed the jury "that only a single conspiracy had been charged and therefore more could not be proved." *Id.* at 766 n.21. Despite "[t]hese * * * abstract similarities" (*id.* at 772), the Court in *Kotteakos* concluded that the variance involved there, unlike that in *Berger*, was prejudicial. See *id.* at 766-777. In so concluding, the Court emphasized that the evidence presented a "danger[] of transference of guilt from one [defendant] to another across the line separating [the] conspiracies." *Id.* at 774.

The court of appeals in this case properly applied the analysis of *Berger* and *Kotteakos*. Here, as in *Berger* and *Kotteakos*, the defendant was charged with a single conspiracy, and the jury was instructed that it had to find that the defendant belonged to "the single, overall

conspiracy charged in the indictment," rather than "several separate conspiracies" (Pet. App. 33a); the evidence at trial, however (as evaluated by the court of appeals), established multiple conspiracies. Here, as in *Berger* and *Kotteakos*, the defendant argued on appeal that that variance was fatal. See Pet. C.A. Br. 14. As the court of appeals correctly noted, however, "[t]he true inquiry" (*Berger*, 295 U.S. at 82) was "whether this variance prejudiced [petitioner's] substantial rights" (Pet. App. 10a). And because this case resembles *Berger* far more than it resembles *Kotteakos*, the court of appeals was correct in concluding that petitioner's substantial rights were not prejudiced by the variance between the indictment and the proof.

2. Petitioner errs in contending (Pet. 16-19) that the Eleventh Circuit's decision in this case conflicts with this Court's decision in *Dunn* v. *United States*, 442 U.S. 100 (1979), and the First Circuit's decision in *Cola* v. *Reardon*, 787 F.2d 681, cert. denied, 479 U.S. 930 (1986).

In *Dunn*, the defendant was indicted under 18 U.S.C. 1623, which prohibits false declarations under oath "in any proceeding before or ancillary to any court or grand jury of the United States." See *Dunn*, 442 U.S. at 101-104. The indictment charged that Dunn's testimony before a grand jury was inconsistent with his later statements during an interview with a defense attorney on September 30, 1976. *Id.* at 103. The evidence at trial focused on the "charged inconsistency between [Dunn's] statements in the September 30 interview and his grand jury testimony." *Id.* at 106. The court of appeals, however, held that the statute under which Dunn was charged did not apply to Dunn's statements during the September 30 interview, because the interview was not a "proceeding ancillary" to the grand jury investigation. See *id.* at 104. The court of appeals nonetheless affirmed

Dunn's conviction based on his adoption of those statements in testimony at a court proceeding on October 21, 1976. See *id.* at 104-105. "[T]he Court of Appeals construed this discrepancy as a nonprejudicial variance between the indictment and proof at trial." *Id.* at 105.

This Court reversed. It "discern[ed] no * * * variance" between the indictment and the proof at trial. *Dunn*, 442 U.S. at 106. Instead, the Court determined that "there was a discrepancy between the basis on which the jury rendered its verdict and that on which the Court of Appeals sustained [Dunn's] conviction." *Ibid.* The Court concluded that "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." *Ibid.*

Dunn is inapposite here. In this case, unlike in *Dunn*, the court of appeals did not uphold petitioner's conviction on the basis of charges that were not alleged in the indictment. The indictment charged petitioner with conspiracies to import and to possess with intent to distribute marijuana that encompassed both the *Dan's Plan* and the *Duke*. See Pet. App. 4a. The court of appeals determined that the proof at trial, however, established that petitioner was involved in a smaller conspiracy that involved only the *Dan's Plan*. *Id.* at 10a-11a. Thus, "the evidence adduced at trial establishe[d] facts different from those alleged in [the] indictment." *Dunn*, 442 U.S. at 105. The Court in *Dunn* made clear that such a variance should be analyzed under *Berger* and *Kotteakos*. See *ibid.*

The First Circuit's decision in *Cola* is likewise inapposite. The defendant in *Cola* was an employee of the Massachusetts Department of Revenue who was convicted in state court of violating state conflict-of-

interest laws by participating in two loans to a delinquent taxpayer. The state appeals court upheld his conviction based not on his participation in the loans but, instead, on his appearance at a bankruptcy proceeding involving the taxpayer. See *Cola*, 787 F.2d at 691-693. Thus, *Cola*, like *Dunn* and unlike the present case, involved a "variance[] between the appellate theory [of guilt] and the proof at trial." *Id.* at 701. The First Circuit's reliance on *Dunn* to grant habeas corpus relief in *Cola* therefore does not conflict with the decision below.

Other First Circuit decisions confirm that there is no conflict between that court and the Eleventh Circuit with respect to the question presented here. For example, in *United States* v. *Glenn*, 828 F.2d 855, 858-861 (1987) (Breyer, J.), the First Circuit stated that it "approach[es] th[e] classical 'single/multiple' conspiracy problem" by applying the "well-established point[]" that "a defendant cannot upset a conviction by showing that the government proved understandings or agreements different from those charged unless the 'variance' between the evidence and the charges prejudiced the defendant, unless it '"affect[ed] the substantial rights" of the accused.'" *Glenn*, 828 F.2d at 857-858 (quoting *Berger*, 295 U.S. at 82, and citing *Kotteakos*, 328 U.S. at 758-760); accord *United States* v. *Sutherland*, 929 F.2d 765, 772-774 (1st Cir.), cert. denied, 112 S. Ct. 83 (1991). That is the same approach that the Eleventh Circuit took here.[3]

---

[3] The decision below is also consistent with decisions in other circuits. See, *e.g.*, *United States* v. *Rosnow*, 977 F.2d 399, 405-408 (8th Cir. 1992) (per curiam), cert. denied, 113 S. Ct. 1596 (1993); *United States* v. *Richerson*, 833 F.2d 1147, 1154-1156 (5th Cir. 1987); see also *United States* v. *Caporale*, 806 F.2d 1487, 1500-1501

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

DAVID S. KRIS
Attorney

SEPTEMBER 1994

(11th Cir. 1986), cert. denied, 482 U.S. 917 & 483 U.S. 1021 (1987); cf. *United States* v. *Eubanks*, 591 F.2d 513, 518 (9th Cir. 1979) (per curiam).